

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>SUMMIT CARBON SOLUTIONS, LLC,</p> <p>Petitioner,</p> <p>v.</p> <p>IOWA UTILITIES BOARD,</p> <p>Respondent.</p>	<p>CASE NO. CVCV062900</p> <p>MOTION TO STRIKE SIERRA CLUB'S PRE-TRIAL DISCLOSURE</p>
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POST-TRIAL BRIEF

COMES NOW the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, and hereby submits this Post-Trial Brief in the above-captioned docket.

INTRODUCTION

Summit Carbon Solutions, LLC (Summit) is seeking a permit from the Iowa Utilities Board (IUB or Board) to construct and operate a hazardous liquid pipeline in Iowa. (IUB Dkt. HLP-2021-0001). According to Summit, the pipeline will collect up to 12 million tons of carbon dioxide emissions from ethanol plants in five states, including Iowa, and transport that carbon dioxide by pipeline to North Dakota for permanent underground sequestration. (Petition for Temporary and Permanent Injunctive Relief, at ¶ 5-6 (hereinafter “Petition”)).

Iowa Code § 479B.4 requires applications for a permit to operate a hazardous liquid pipeline to conduct public information meetings “in each county in which real property or property will be affected.” Notice of those meetings must be sent to “each landowner affected by the proposed project and each person in possession of or residing on the property.” Iowa Code § 479B.4. Summit’s proposed pipeline would gather carbon dioxide from twelve ethanol plants in Iowa. (Petition at ¶ 5). The number of pipeline miles necessary to connect Iowa’s ethanol plants to the pipeline project required Summit to develop a service list for public information meetings that included over 15,000 records. (Petition at ¶ 12). On August 13, 2021, Summit filed the list of landowners (Landowner Lists) with the Board and simultaneously filed a request for confidential treatment. (Petition at ¶15).

On November 19, 2021, Sierra Club, Iowa Chapter (Sierra Club) filed a “Motion to Release Landowner List.” (Petition at ¶ 25). In that motion, Sierra Club included a request that the motion be considered as an open records request pursuant to Chapter 22 of the Iowa Code. (Petition at ¶ 25). On November 23, 2021, the Board issued an “Order Granting in Part and Denying in Part Request for Confidential Treatment, With Dissenting Opinion,” in which the Board found that the personal records of individual on the list should be withheld from the public, but that the identities of business and government entities on the list would be released in 20 days. (Petition at ¶ 26, 28). On November 30, 2021, the Board issued a “Notice of Records Request,” stating that it had received an open records request from Sierra Club and providing Summit with 14 days’ notice and opportunity to seek an injunction preventing release of the Landowner List. (Petition at ¶ 30-31). Summit filed a “Petition for Temporary and Permanent Injunctive Relief” in this Court on December 14, 2021, seeking to prevent the Board from releasing the Landowner List pursuant to Sierra Club’s open records request.

On February 11, 2022, this Court issued an Order Granting Motion for Temporary Injunction (Temporary Injunction Order) in this docket, preventing the Board from releasing the Landowner Lists pending the final outcome of this proceeding. The Temporary Injunction Order limited the issue remaining for consideration of a permanent injunction to the question of whether the landowner list falls under the exception in Iowa Code § 22.7(18), which excludes the following information from open record requirements:

“Communications not required by law, rule, procedure, or contract, that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination.”

Specifically, the Temporary Injunction Order stated that the primary question in this case is whether the landowner list was a communication that was “required by law, rule, procedure, or contract.” (Temporary Injunction Order at 4).

On March 21, 2022, Sierra Club filed a “Motion for Summary Judgment.” After briefing and oral arguments, the Court issued an “Order Denying Motion for Summary Judgment” (Summary Judgment Order) on June 2, 2022. A bench trial was conducted over the course of two days – July 7, 2022 and August 3, 2022 – for the purpose of gathering evidence.

ARGUMENT

I. Burden of Proof

As this Court noted in the Temporary Injunction Order, “It is undisputed that Summit is an ‘identified person outside of government’ and that the Board is a ‘government body’ for purposes of the Open Records Act. (Temporary Injunction Order at 3). The Iowa Supreme Court has consistently held that the purpose of the Open Records Act is “to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making

activities from the public on whose behalf it is its duty to act.” *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W. 2d 540, 549 (Iowa 2021) (alteration in original) (internal citations omitted). When reviewing cases under the Open Records Act, “‘There is a presumption in favor of disclosure’ and ‘a liberal policy in favor of access to public records.’” *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019) (quoting *Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012)).

Summit claims that although the landowner lists are public records, they should be kept confidential under the exemption in Iowa Code § 22.7(18). When determining whether a public record should remain confidential under that exemption, “Disclosure is the rule, and one seeking the protection of one of the statute’s exemptions bears the burden of demonstrating the exemption’s applicability.” *Ripperger*, 967 N.W. 2d at 550 (internal citations omitted). Because Summit is seeking the protection of an exemption, Summit bears the burden of proof and must overcome the presumption in favor of disclosure.

II. The Exemption in Iowa Code § 22.7(18) Does Not Apply to the Landowner Lists

The disclosure exemption in Iowa Code § 22.7(18), contains several elements, all of which must be met for the exemption to apply. Those elements are:

1. A communication is made that is not required by law, rule, procedure, or contract;
2. The communication was made to a government body or to any of its employees;
3. The communication was made by identified persons outside of government; and
4. To the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination.

In this case, it is clear that the landowner lists are communications made to a government body by persons outside of government and that elements two and three are not in question. Analysis

of the first and fourth elements leads to the conclusion that the exemption does not apply the Landowner Lists at issue in this case and the Landowner Lists should be made public.

A. The Landowner Lists Were Provided Pursuant to Board Procedure.

As the Court noted in the Summary Judgment Order, “The parties agree that there is no law, rule, or contract that required Summit to provide the list to the Board.” (Summary Judgment Order at 2). The remaining question, therefore is whether the Landowner Lists were provided pursuant to Board procedure. In the Summary Judgment Order, the Court also noted that, “there is no evidence in the record that any policy or procedure regarding such lists was ever reduced to writing.” (Summary Judgment Order at 6). Nor was any such evidence produced at trial. However, the Court also explained, “Such formalities are not required for a ‘procedure’ to exist.” (Summary Judgment Order at 6) (internal quotations in original).

While there is no specific law or rule requiring filing of landowner lists in hazardous liquid pipeline permit proceedings, the Board has broad authority with respect to the information it requires to be filed. Iowa Code § 474.3 provides, “The utilities board may in all cases conduct its proceedings, when not otherwise prescribed by law, in such manner as will best conduce to the proper dispatch of business and the attainment of justice.”

Summit and Sierra Club both introduced exhibits containing interrogatory responses from the Board as trial exhibits. Summit and Sierra Club both reach different conclusions about the existence of a procedure requiring submissions of landowner lists based on the interrogatory responses. Chair Huser summed up this conundrum at trial, stating, “I do not believe anything is routine as it relates to any hazardous liquid pipeline.” (Day 2 Tr. 10:5-6). However, the lack of any “routine” with respect to the *content* of the information the Board requests in hazardous

liquid pipeline is not an indication of a lack of *procedure* the Board uses to request the information needed in each case.

At trial, OCA witness Jennifer Johnson described the unwritten pre-filing procedure she became familiar with during her time as Assistant General Counsel at the Board. This unwritten procedure began when a company “would approach board staff or the board itself to inform them of projects that they were interested in initiating, or to alert the board or board staff about projects that were coming and asking if they could meet with board staff about what might be required.” (Day 1 Tr., 6:18-23). During those meetings, board staff and the company “would talk about the rules that were applicable, any statutory authority that was applicable, things that board staff would be looking at, things that the board might require.” (Day 1 Tr., 7:3-6). The information requested at those meetings was tailored to each proceeding. (Day 1 Tr., 13:22-24). The understanding was that “information that the board staff was seeking should be submitted in order to facilitate the process.” (Day 1 Tr., 10:8:10). Ms. Johnson made clear the required nature of board staff’s information requests at these meeting by confirming that “it would be correct that the board would enforce that requirement through an issuance of an order.” (Day 1 Tr., 13:12-14).

Chair Huser’s trial testimony supported Ms. Johnson’s description of the Board’s unwritten procedures. Chair Huser’s testimony establishes that Summit’s Landowner Lists were requested before December 16, 2021, but that request was not contained in an order. (Day 2 Tr. 14:1-2). This is consistent with Ms. Johnson’s description of unwritten pre-filing procedures. Chair Huser stated that before December 16, 2021, the Board determined whether to request landowner lists on a case-by-case basis. (Day 2 Tr. 17:7-9). Chair Huser further described circumstances which might lead the Board not to require a company to provide a landowner list, including the

number of parties who receive notice. (Day 2 Tr. 6-8). This is consistent with Ms. Johnson's testimony that the information requested was tailored to each proceeding. However, Chair Huser confirmed that "If we requested information, it was to assist us with doing our work." (Day 2 Tr. 8:24-9:1). This supports Ms. Johnson's testimony that pre-filing procedures existed to facilitate the process that the company would be initiating. Finally, Chair Huser supported Ms. Johnson's testimony regarding the obligatory nature of information requests, confirming that if a company refuses to provide any requested information, the Board can issue an order requiring the company to provide that information. (Day 2 Tr. 10:24-11:2).

While some individual statements in trial testimony or interrogatory responses may appear contradictory, when taken as a whole, the testimonies of Ms. Johnson and Chair Huser are very consistent with respect to the procedure of identifying and requesting the necessary information for each case it hears. The fact that the *content* of information requests may vary from case to case, a fact confirmed by both Ms. Johnson and Chair Huser, does not alter the *procedure* itself – identifying and requesting necessary information. This is consistent with the Board's authority to conduct proceedings in the manner it believes most conducive to the interest of justice and supports a finding that the open records exception in Iowa Code § 22.7(18) does not apply to the Landowner Lists.

B. The Board Could Not Reasonably Believe That Summit Would Not Provide The Landowner Lists If The Landowner Lists Were Available For Public Examination.

However, even if the Court determines that the landowner lists were not provided to the Board pursuant to Board procedure, the analysis is not complete. Communications that are not made pursuant to law, rule, procedure, or contract are only exempt "*to the extent* that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that

government body if they were available for general public examination.” Iowa Code § 22.7(18). In the absence of a procedural requirement to provide the landowner lists, Summit still bears the burden of proving that the government body (the Board) could *reasonably believe* that Summit would be discouraged from providing the landowner lists if the lists were available for general public examination.

When determining whether the government agency “could reasonably believe” that making the communication public would discourage the outside party from making that communication, courts apply “an objective test, from the perspective of the record custodian.” *Ripperger*, 967 N.W. 2d at 553. In *Ripperger*, the Court found that it was reasonable for the custodian of a list of names of people who requested to have their names removed from the online search feature of property records to believe that making the list of names public would discourage people from requesting to have their name removed from the online search feature. *Id.* The Court provided two primary reasons for reaching that conclusion.¹ First, simple logic leads to the conclusion that people who want more privacy with respect to their identification in online searches would not want the fact that they made that privacy request to become public information. *Id.* Second, the Court relied on evidence showing that after the *Des Moines Register* published a story about the potential for the list of names in question to become public, “many” of the property owners on the list tried to get their names removed. *Id.*, at 553-54. The

¹ The Court added a third reason, which is that individuals on the list should have been able to rely on the statement on the Assessor’s website that requests should be confidential. *Ripperger*, 967 N.W. 2d at 554. However, the Court cautioned, “But we emphasize that government officials cannot shield public documents from examination merely by promising confidentiality for communications that *otherwise* fall outside section 22.7(18).” *Id.* (emphasis in original). As explained further below, the documents in this case *otherwise* fall outside of section 22.17(8), and the Board’s November 23, 2021 “Order Granting in Part and Denying in Part Request for Confidential Treatment, With Dissenting Opinion” and any other Board statements regarding confidentiality of the Landowner Lists do not shield the Landowner Lists from disclosure pursuant to Iowa Code § 22.7(18).

Court explained, “People effectively voted with their feet, thereby demonstrating the feared chilling effect of disclosure was real.” *Id.*, at 554.

Here, unlike *Ripperger*, it would not be reasonable for the Board to believe that Summit would not provide the Landowner Lists if the Landowner Lists were available for public examination. There is no evidence that making the Landowner Lists public would have a chilling effect on companies seeking permits to construct hazardous liquid pipelines. Nor is there a privacy nexus like that with the list in *Ripperger*, where making the list public would counteract the purpose for which the list was created (i.e. to provide greater privacy to the people on the list).

Summit provided the Landowner Lists to the Board in the docket created for Summit’s eventual petition for a certificate of public convenience and necessity to construct and operate a hazardous liquid pipeline pursuant to Iowa Code Chapter 479B. Summit created the landowner lists in order to carry out public information meetings required in Iowa Code Chapter 479B. As noted above, the Board has broad authority to conduct proceedings in the manner it deems in the interest of justice. Iowa Code § 474.3. The Board’s December 16, 2021 “Order Regarding Filing Requirements and Addressing Survey Timing,” explained that a list of potentially impacted landowners is “an important document that allows the Board to determine whether there are conflicts of interest with the proposed pipeline and whether proper notice has been provided to landowners in the corridor.” (Appendix in Support of Sierra Club’s Motion for Summary Judgment at 3). At trial, Chair Huser reiterated that those are the “two predominant reasons” for a general procedure of requesting landowner lists (Day 2 Tr., 8:3). Chair Huser also explained, “If we requested information, it was to assist us with doing our work.” (Day 2 Tr. 8:24-9:1).

Summit is seeking to construct and operate an expansive pipeline project that spans five states. The Board has explained that it needed the Landowner Lists in order to exercise its authority under Iowa Code Chapter 479B and consider Summit's petition for a certificate of public convenience and necessity to operate the Iowa portion of the pipeline. If Summit did not provide the Landowner Lists to the Board, the Board would not have all the information the Board deems necessary to ensure that Summit complied with the requirements of Iowa Code Chapter 479B. If the Board does not get the information it deems necessary to ensure compliance with Iowa Code Chapter 479B, the Board will not have sufficient information to approve Summit's petition for a certificate of public convenience and necessity. It is clearly not reasonable for the Board to believe that Summit would "vote with its feet," as the interested parties in *Ripperger* did, and jeopardize an entire five-state pipeline project because simply because the Iowa Landowner Lists would be made public. Summit may not like the idea of the Landowner Lists being available to the general public, but that mere dislike is far from sufficient to meet Summit's burden of proof to overcome the presumption in favor of disclosure.

CONCLUSION

For the reasons stated above, OCA respectfully requests that the Court find that Summit provided the Landowner Lists to the Board pursuant to Board procedure, or alternately that the Board could not have reasonably believed that Summit would be discouraged from providing the Landowner Lists to the Board if the Landowner Lists were available to the general public. Consequently, the exemption to disclosure in Iowa Code § 22.7(18) does not apply and the Landowner Lists should be made available to the general public.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2022, the foregoing Post-Trial Brief was filed with the Clerk of Court using the EDMS system which will send electronic notice of the filing to the parties of record.

/s/ Anna K. Ryon
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